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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/718,213	11/20/2003	Jillian Jacobson-Alti	RMS-4573-0004	9010
53437	7590	04/13/2007	EXAMINER	
ROBERT M. SCHWARTZ, P.A. P.O. BOX 221470 HOLLYWOOD, FL 33022			MERCIER, MELISSA S	
		ART UNIT	PAPER NUMBER	
		1615		

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/13/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/718,213	JACOBSON-ALTI, JILLIAN	
	Examiner	Art Unit	
	Melissa S. Mercier	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 21 February 2007.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-17 is/are pending in the application.
4a) Of the above claim(s) 3-6 and 11-17 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-2, 7-10 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f):
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____

5) Notice of Informal Patent Application

6) Other: _____

DETAILED ACTION

Summary

Receipt of Applicants Remarks and Amended Claims filed on February 21, 2007 is acknowledged. Claims 1-2 and 7-10 are under prosecution in this application. It is unclear to the examiner why applicant has indicated claim 10 to be withdrawn from consideration in the amended claims. The examiner has not withdrawn the claim from consideration.

Claim Rejections - 35 USC § 112

In light of Applicants Amendments to the Claims, the examiner has withdrawn the rejections under 35USC112, second paragraph.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-2 and 7-10 rejected under 35 U.S.C. 103(a) as being unpatentable over Shanni (US Patent 5,631,012) in view of Deckers et al. (US Patent 6,372,234).

Shanni discloses lip pomade comprising 5.00% ozokerite, 10.00% isopropyl myristate, and a fragrance/flavor portion (Example 6). Pomade is defined as a perfumed oil or ointment by dictionary.com and would therefore be considered a liquid formulation.

Shanni does not disclose the use of a colorant in the formulation.

Deckers teach a cosmetic composition comprising oil bodies suitable for use in lipsticks, lip-glosses, lip balms and lip pencils.

Deckers cosmetic composition further comprises fragrances. Deckers defines a fragrance as any component reacting with the human olfactory sites and imparting a pleasurable odor, essence, or scent. Fragrances taught by Deckers include linear and cyclic alkenes, primary, secondary, and tertiary alcohols, ethers, esters, ketones, nitrites, and saturated and unsaturated aldehydes" (column 17, lines 18-52).

The use of a preservative in order to treat against contamination by bacteria, fungi and viruses is disclosed (column 13, lines 21-26).

Deckers further discloses the addition of pigments, including titanium dioxide, zinc oxide, black, yellow, red and brown iron oxides, for example (column 22, lines 47-56); antioxidants, including plant extracts (column 23, lines 1-12).

Deckers teaches the use of "esters including C₈-C₃₀ alkyl esters of C₈-C₃₀ carboxylic acids; C₁-C₆ diol monoesters and diesters of C₈-C₃₀ carboxylic acids; C₁₀-C₂₀ alcohol monosorbitan esters, C₁₀-C₂₀ alcohol sucrose di- and tri- esters; C₁₀-C₂₀ alcohol sucrose mono-, di-, and tri- esters; and C₁₀-C₂₀ fatty alcohol esters of C₂-C₆ 2 hydroxyacids, examples included sorbitan" (column 16, lines 41-53).

The instant claims differ from the references only in the specific percentage selected for the compositions. However, it would have been deemed prima facie obvious to one having ordinary skill in the art at the time of the invention to optimize the percentage of bodying agents, odorants, and flavorants to prepare a composition containing for topical treatment to the lips because the determination of a specific percentage having the optimum therapeutic effect is well within the level of one having ordinary skill in the art, and the artisan would be motivated to determine optimum amounts to get the maximum effect of the active compounds. Therefore, the invention as a whole has been prima facie obvious to one of ordinary skill in the art at the time the invention was made.

It is generally considered to be prima facie obvious to combine compounds each of which is taught by the prior art to be useful for the same purpose in order to form a

composition that is to be used for an identical purpose. The motivation for combining them flows from their having been used individually in the prior art, and from them being recognized in the prior art as useful for the same purpose. As shown by the recited teachings, instant claims are no more than the combination of conventional components of commonly known to be used in the art of lip stick/gloss compositions. It therefore follows that the instant claims define prime facie obvious subject matter. Cf. In re Kerhoven, 626 F.2d 848, 205 USPQ 1069 (CCPA 1980).

Response to Arguments

Applicant's arguments with respect to claims 1-2 and 7-10 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

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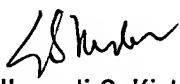
extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Melissa S. Mercier whose telephone number is (571) 272-9039. The examiner can normally be reached on 7:30am-4pm Mon through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


MSMercier


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